Supreme Court, U.S.
FILED
OCT 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-543

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES N. SLAYTON,

Plaintiff-Petitioner,

vs.

BECHTEL POWER CORPORATION; SOUTHERN CALIFORNIA EDISON COMPANY, A Corporation; BECHTEL CONSTRUCTION COMPANY, INC.,

Defendants-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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STATEMENT OF THE CASE

In a decision filed on February 16, 1989, the Court of Appeal for the Fourth Appellate District, Division One, of the State of California affirmed the judgment notwithstanding the verdict in favor of Bechtel of the Superior Court of San Diego County, State of California, Terry B. O'Rourke, Judge.

In reaching its decision, the Court of Appeal applied the standard of review prescribed under California law in appeals from a judgment notwithstanding the verdict. It noted:

> In granting a judgment notwithstanding the verdict, the trial court cannot weigh the evidence or judge the credibility of witnesses;

and it, as well as this court on appeal, must view the evidence and draw all reasonable inferences in favor of the jury's verdict. (Hauter v. Zogart's (1975) 14 Cal.3d 104, 110-111.) If there is any substantial evidence in support of the jury's verdict, the motion for judgment notwithstanding the verdict must be denied. (Ibid.) We must determine if there is substantial evidence to support the jury's verdict, which includes an award of punitive damages.

See Appendices to Petition for Writ

of Certiorari, page 32.

In scrupulously applying this standard to the evidence, the Court of Appeal first proceeded to evaluate whether there was any substantial evidence of pretext to support the jury's verdict of wrongful termination based on lack of good cause. The Court of Appeal carefully addressed each of the arguments advanced by Slayton, the appellant, in his brief. The appellate court observed that Slayton primarily focused on an argument that Bechtel had fired him based on a charge he had falsified records, knowing in fact it was Vealey, not he, who had falsified the pertinent documents. The Court of Appeal noted that "[t]he record refutes this argument." See

Appendices, page 32. The appellate court rejected Slayton's argument of pretext in this regard.

The Court of Appeal also considered Slayton's argument that Vealey had some kind of power over Bechtel and that Bechtel had fired Slayton to appease Vealey rather than because Slayton's conduct had warranted termination. See Appendices, page 33. After carefully reviewing all the evidence which could have been construed as relevant to this issue, and resolving all conflicts and drawing all inferences in favor of the jury's verdict, the appellate court concluded that it was unable to draw the necessary inference that Vealey was in a position of being able to influence

Bechtel management to fire Slayton for reasons independent of Slayton's own misconduct. See Appendices, page 35.

After noting that "[t]he inference could be drawn that if not for political pressure to have a safe nuclear power plant, Bechtel would not have felt the need to issue the drastic sanction of termination for what could be perceived as a minor procedural violation", the Court of Appeal stated that "this type of 'political' motivation cannot be characterized as wrongful. The motivation to fire an employee because of pressure to respond to an incident that affects nuclear safety is valid; it is not a wrongful "political" motivation in the sense

of an act arising from motivations such as favoritism, or power or personality conflicts." The appellate court further concluded that "[i]t was legitimate for management to reject a report which characterized a violation as minor, when the policy was to require strict adherence to all quality control procedures, and deviation therefrom could therefore not be considered a minor matter." See appendices page 39-40.

The Court of Appeal, after concluding that there was no substantial evidence of pretext, saw no inferences in the record to undermine the evidence of good cause. It stated:

The record indisputably

> shows management had a legitimate reason for terminating Slayton based on his admitted act of authorizing a welder to place his 'P' number on a weld he did not perform.

See Appendices, pages 40-41.

Given its holding that the trial court properly entered a judgment in favor of Bechtel nothwithstanding the jury verdict, the Court of Appeal, in accordance with California Code of Civil Procedure section 629, determined it need not address the trial court's order granting Bechtel's motion for a new trial. See Appendices, pages 3, 42.

On May 3, 1989, the California Supreme Court filed its Order Denying

Review After Judgment by the Court of Appeal in this matter.

At no time, either before the trial court, or in his appeal from the trial court's judgment in favor of Bechtel or in his petition for review to the California Supreme Court, did the petitioner, Slayton, ever raise the issue of whether California Code of Civil Procedure section 629 was repugnant to or in violation of the Seventh Amendment of the United States Constitution or any other federal constitutional or statutory provisions. Indeed, petitioner never raised any federal questions in the state courts below.

SUMMARY OF ARGUMENT

The Petition for Writ of

Certiorari filed by Charles N. Slayton should be denied.

The federal questions which the petitioner seeks to have reviewed by this Court have never previously been raised by the petitioner below. The petitioner has never raised any federal questions either in the court of first instance or in either of the California appellate courts which were asked to review the trial court's judgment. Indeed, the petitioner has failed to comply with Rule 21.1(h) of the Rules of The Supreme Court of the United States in that he has made absolutely no reference in his petition to the stage in the proceedings at which the federal questions were raised nor has he provided any of the other

information called for in that Rule.

Furthermore, the federal questions sought to be reviewed are not substantial in light of prior decisions of this Court. Indeed, petitioner has failed to set forth any reasons in his petition to justify review which comport with the kinds of reasons identified in Rule 17 of this Court's Rules. The petitioner has not shown that the federal questions he seeks to have reviewed have been decided in conflicting ways by different state courts of last resort. Nor has the petitioner identified an important question of federal law decided by a state court in this proceeding which has not been, but should be, settled by this Court or which has been

decided in a way in conflict with applicable decisions of this Court.

The petitioner's central contention in his petition is that California Code of Civil Procedure section 629, governing the granting of judgments notwithstanding the verdict, violates the Seventh Amendment of the United States Constitution. However, this Court has held that the Seventh Amendment does not apply to the states and is not made applicable to the states through the Fourteenth Amendment. Therefore, the petitioner's central contention is entirely without merit.

Furthermore, it is worthy to note that this Court has held on a number of occasions that a federal court's grant of judgment notwithstanding the

verdict does not violate a party's rights under the Seventh Amendment to the United States Constitution.

Petitioner's other contentions are equally without merit. Pursuant to California Code of Civil Procedure section 629, where a judgment notwithstanding the verdict is affirmed on appeal, a trial court's alternative order granting a motion for a new trial is moot and should be dismissed.

In this instance, the California appellate court properly did not address the order granting Bechtel's motion for a new trial while addressing all other issues raised by the petitioner in his appeal.

Finally, petitioner seeks review of the decision of the California

Supreme Court in Foley v. Interactive Data Corp. regarding the absence of tort remedies for a breach of the implied covenant of good faith and fair dealing in the employment context. The decision in Foley was of absolutely no consequence to the decision reached by the California Court of Appeal in this matter. That issue is simply not relevant to these proceedings.

ARGUMENT

I.

THE PETITION SHOULD BE DENIED AS NO FEDERAL QUESTIONS WERE RAISED OR PASSED UPON IN THE STATE COURTS BELOW

Whether the requirement stands as a jurisdictional bar or merely as a prudential restriction, this Court

has long refused to review federal questions which were not raised and passed upon in state court. Illinois v. Gates (1983) 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527.

In Webb v. Webb (1981) 451 U.S. 493, 496-7, 501, 101 S.Ct. 1889, 68 L.Ed.2d 392, this Court stated:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. . . .
>
> . . . At the minimum,

however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

In Bankers Life & Casualty Co. v. Crenshaw (1988) 486 U.S. 72, 108 S.Ct. 1645, 100 L.Ed.2d 62, this Court noted that "[i]n determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the policies that animate the 'not pressed or passed upon below' rule. These

policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal." 100 L.Ed.2d at 72-73.

In this instance, petitioner has failed to raise in the state courts below any of the federal questions for which he seeks review in this Court. Indeed, he has failed to comply with Rule 21.1(h) of the Rules of The Supreme Court of the United States by omitting any reference in his statement of the case to the stage of the proceedings below in which any federal questions were raised and passed upon. He has simply argued that the issues he presented to the state appellate

court "in effect" draw into question a federal question. This is clearly an insufficient basis for review by this Court.

Whether on jurisdictional or prudential grounds, this Court should deny the petition on the basis of petitioner's failure to raise or have passed upon any of the federal questions he is seeking to have reviewed by this Court.

II.

THIS PETITION SHOULD BE DENIED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION

In Equitable Life Assurance Society v. Brown (1902) 187 U.S. 308, 311, 23 S.Ct. 123, 47 L.Ed. 190, this Court observed:

But it is settled that not

every mere allegation of a Federal question will suffice to give jurisdiction. "There must be a real substantive question on which the case may be made to turn," that is, "a real, and not a merely formal, Federal question is essential to the jurisdiction of this court." Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise

> appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. [Citation omitted.]

In this instance, in light of this Court's previous decisions, as discussed in greater detail below, petitioner has failed to raise any substantial federal questions. See Walker v. Sauvinet (1876) 92 U.S. 90, 23 L.Ed. 678; Baltimore and Carolina Line v. Redman (1935) 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636; Neely v.

Martin K. Eby Construction Co. (1967) 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75; Montgomery Ward & Co. v. Duncan (1940) 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147.

For this reason, the petition should be denied.

III.

THE SEVENTH AMENDMENT DOES NOT APPLY TO THE STATES AND IS NOT MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT

Petitioner asserts that "[t]he basic premise upon which this Petition for Writ of Certiorari is directed to this Court" is that a California state trial judge's power to grant judgment notwithstanding the verdict "is unconstitutional in view of the Seventh Amendment to the

United States Constitution." See Petition, pages 27-28. Petitioner cites no authority in support of his position.

Indeed, petitioner's position is untenable. This Court has consistently held that the Seventh Amendment to the United States Constitution does not apply to the states and is not made applicable to the states through the Fourteenth Amendment to the United States Constitution. Walker v. Sauvinet, supra, 92 U.S. 90; Alexander v. Virginia (1973) 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993; Melancon v. McKeithen (ED La 1972) 345 F.Supp. 1025, 1027, 1035-45, 1048, aff'd sub nom Mayes v. Ellis (1972) 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214,

and Hill v. McKeithen (1972) 409 U.S. 943, 93 S.Ct. 290, 34 L.Ed.2d 214.

Hence, petitioner's challenge to California Code of Civil Procedure section 629 fails to raise a substantial federal question.

Furthermore, it is significant to note that this Court has held that the power of a trial judge and appellate court in the federal judicial system to grant judgment notwithstanding the verdict does not violate the Seventh Amendment to the United States Constitution. Baltimore and Carolina Line v. Redman, supra, 295 U.S. 654; Neely v. Martin K. Eby Construction Co., supra, 386 U.S. 317; Montgomery Ward & Co. v. Duncan, supra, 311 U.S. 243.

For these reasons, the petition

should be denied.

IV.

THE CALIFORNIA APPELLATE COURT PROPERLY DID NOT ADDRESS THE TRIAL COURT'S ORDER GRANTING BECHTEL'S MOTION FOR NEW TRIAL

In his petition, petitioner seems to contend that the California Court of Appeal erred in failing to address in its decision the trial court's order granting Bechtel's motion for a new trial. See Petition, Question Presented C., pages iii-iv.

Petitioner's contention is incorrect. Furthermore, such a claim fails to raise a federal question.

California Code of Civil Procedure section 629 provides, in pertinent part, as follows:

If the court grants the

> motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed. . .

In this instance, the Court of Appeal affirmed the judgment notwithstanding the verdict. As such, petitioner's appeal from the trial judge's order granting Bechtel a new trial became moot and was dismissed. Kaake v. Lott (Cal. Ct. of Appeal, 2d Dist. 1967) 252

Cal.App.2d 895, 60 Cal.Rptr. 843. The Court of Appeal appropriately considered all other issues raised by petitioner in his appeal.

V.

PETITIONER MAY NOT REQUEST HYPOTHETICAL ADVICE FROM THIS COURT REGARDING THE FOLEY DECISION

In the fifth issue which he seeks to have reviewed by this Court, petitioner requests that this Court review the California Supreme Court's decision in Foley v. Interactive Data Corp. on the ground that its preclusion of tort remedies for breaches of the implied covenant of good faith and fair dealing in employment contexts violates the Fifth and Fourteenth Amendments to the United States Constitution.

This is another instance in which petitioner seeks to pose a federal question which he never raised or had passed on in the state courts. For that reason alone his petition should be denied.

But, in addition, as he has done before, petitioner is attempting to place the cart before the horse and to pose an issue irrelevant to these proceedings in the hope that it will be a basis for review. Indeed, petitioner raised the issue of the Foley decision before the California Supreme Court in his petition for review. At that point, he raised only the issue of its retroactivity, despite the fact that the Court of Appeal had explicitly held that it did not have to reach that issue in

rendering its decision. See Appendices, page 31, footnote 18. The California Supreme Court denied the petition for review.

On this occasion, petitioner argues that "[t]he reason we are concerned with Foley is that in the event this Court grants its writ of Certiorari as herein prayed it will be concerned with that portion of the verdict that was set aside as above set forth which awards $600,000.00 in punitive damages for the violation of the covenant of good faith and fair dealing which has been held by the California Supreme Court to be present in every case in California -- that is except in employment contracts as held by Foley." See Petition, pages 21-22 (emphasis

added).

Not only does petitioner misstate the substance of the Foley decision, but he concedes that the issues it addressed are merely hypothetical at this time in his case and not a basis for granting the petition. Indeed, this Court will not consider hypothetical issues or issues that are not ripe. Aetna Life Ins. of Hartford v. Haworth (1937) 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617. The Foley decision had absolutely no effect on the outcome of petitioner's action in the state courts.

For these additional reasons, the petition should be denied.

CONCLUSION

Petitioner has filed a frivolous petition for writ of certiorari with

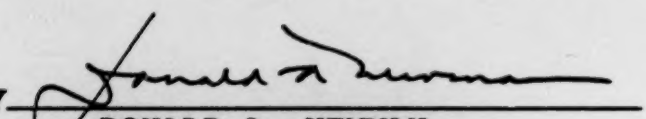
this Court. He seeks review of issues which were never raised or passed on in the state courts below. He has raised federal questions for the first time in his petition but has failed to cite, address or distinguish prior decisions of this Court which have directly addressed the questions. And he has failed to set forth any special and important reasons justifying review in accordance with Rule 17 of this Court.

Indeed, there are no reasons justifying review in this instance. Respondents respectfully request that the petition be denied.

DATED: October 26, 1989

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES

By 

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